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248026—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE POLAKOFF AND WILLIAM ALBERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on June 26, 1940, reversing the convictions of the respondents in the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the court below (R. 300–308) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 26, 1940 (R. 308). The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the recording of a telephone conversation, with the authorization of one party thereto, on a recording apparatus attached to an extension line, constitutes a violation of Section 605 of the Federal Communications Act.

STATUTE INVOLVED

Section 605 of the Federal Communications Act (c. 652, 48 Stat. 1064, 1103, 47 U. S. C., Sec. 605) provides in part as follows:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *

STATEMENT

Respondents were indicted for conspiracy to obstruct justice by attempting to influence an Assistant United States Attorney in his recommendation of sentence to the district judge in the case of one Sidney Kafton (R. 4–6). Respondents were found guilty by the jury (R. 266) and each was sentenced to two years' imprisonment (R. 6–7).

Kafton had been indicted for narcotic offenses (R. 19). Respondent Albert proposed to Kafton

that if he would plead guilty and pay a sum of money, Albert would have a "certain party" induce the Assistant United States Attorney in charge of Kafton's case to recommend to the district judge that a light sentence be imposed (R. 24–25). Kafton immediately reported the incident to agents of the Narcotic Bureau (R. 25, 195), who instructed him to continue negotiations in order to ascertain how far Albert would go (R. 67). Albert's contact with the Assistant United States Attorney was through respondent Polakoff; as the record discloses, Polakoff took active steps in an endeavor to have the Assistant United States Attorney recommend a short term of imprisonment for Kafton (see, e. g., R. 78 *et seq.*, 161–162, 164 *et seq.*).

Kafton told agents of the Federal Bureau of Investigation, to whom he had been sent by agents of the Narcotic Bureau, what had occurred (R. 27, 100). Through a telephone in the offices of the F. B. I., Kafton had a talk with each of the respondents, which was recorded upon a machine attached to an extension in the same circuit as the telephone which Kafton used (R. 103, 203–204, 212–216). The recording of the conversations was done by F. B. I. agents with the knowledge and permission of Kafton (R. 203–204, 212–214). Each of the respondents made damaging declarations in his talk with Kafton which implied the existence of an unlawul conspiracy to obstruct justice (R. 213–214, 216–218).

At respondents' trial, Kafton, as part of the Government's direct case, testified about his telephonic conversations with respondents (R. 27–28, 30–31). During the course of defendants case, Albert, on cross-examination, denied that he had ever spoken to Kafton on the telephone (R. 148–149). Respondent Polakoff admitted talking with Kafton, but his version of the conversation differed substantially from the version previously given by Kafton (R. 30–31, 170–171). Under these circumstances, as part of its rebuttal, the Government offered in evidence the recordings made during the two telephone calls (Exs. 5, 6, R. 213–216).

On appeal to the court below, respondents' convictions were reversed on the sole ground that the recordings were improperly admitted in evidence (R. 303, 309). The majority opinion of the court was delivered by Judge Learned Hand (R. 300); a sharp dissenting opinion was delivered by Judge Clark (R. 304); and a concurring opinion was delivered by Judge A. N. Hand (R. 303). In the concurring opinion, Judge A. N. Hand stated that he would be "gratified" if the Supreme Court would adopt the views expressed by Judge Clark in his dissenting opinion, but that he felt constrained to concur in the opinion of Judge Learned Hand because of the decisions in *Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321; and *Nardone* v. *United States,* 308 U. S. 338.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the recording of a telephone conversation with the authorization of one party thereto, on a recording apparatus attached to an extension line, is an "interception" within the meaning of Section 605 of the Federal Communications Act.

2. In holding that under Section 605 of the Federal Communications Act one party to a telephone conversation, without the consent of the other, cannot validly authorize a Government agent to overhear, record, and divulge such conversation.

3. In holding as a matter of law that a person who, with the consent of one party to a telephone conversation, listens to such conversation, cannot testify to the substance of the conversation over the objection of the other party to the conversation.

4. In reversing the judgments of conviction.

REASONS FOR GRANTING THE WRIT

The question decided by the court below is one of first impression in the Circuit Courts of Appeals.[1] Although there is, therefore, no conflict of decisions, the issue is of such obvious importance in the administration of the federal criminal laws as

[1] The question was, however, raised in the case of *United States* v. *Yee Ping Jong*, 26 F. Supp. 69 (W. D. Pa.), and decided directly contrary to the decision below.

to call for review by this Court.[2] The desirability of review in the present case, without awaiting a possible future conflict, is emphasized by the fact that the decision below will presumably control the activities of the Federal Bureau of Investigation, not only in the territory covered by the Second Circuit but throughout the country, unless and until the decision is reversed or disapproved by this Court.

It is clear from the opinions in the court below that respondents' convictions were reversed only because the majority of the court felt that the case fell within the principles announced by this Court in the two *Nardone* cases (*Nardone* v. *United States,* 302 U. S. 379; *id.,* 308 U. S. 338) and in *Weiss* v. *United States,* 308 U. S. 321. Judge A. N. Hand made this clear in his concurring opinion (R. 303):

> I concur in the opinion of Judge Learned Hand in the above case and also with the opinion (*Per Curiam*) in *United States* v. *Fallon,* because the results reached seem to follow inevitably from the recent decisions of the Supreme Court which have construed the Federal Communications Act as pre-

[2] The issue is also of importance in civil cases since, as we point out below, it would prevent a party to a civil suit from offering in evidence in support of his testimony as to the substance of a telephone conversation either the testimony of, or a transcription of the conversation made by, a secretary listening at an extension phone without the knowledge of the other party to the conversation.

venting the use of telephonic messages obtained through interception, without the consent of the sender, as evidence in criminal prosecutions.

It may be that the views expressed by Judge Clark in his dissenting opinion will prevail and I should be gratified if the Supreme Court would go even so far. But it is difficult for me to see how such a line can be drawn in view of the reasons given for the decisions in *Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321; and *Nardone* v. *United States,* 308 U. S. 338.

In our view, the decision below in the present case was in no way compelled or authorized by the *Nardone and Weiss* decisions, but to the contrary constitutes an unwarranted and unreasonable extension of the principle of those cases.

Construction of Section 605 of the Communications Act to prohibit what is commonly known as wire-tapping was based, as this Court stated in the second *Nardone* case, not upon a "meticulous reading of technical language" but upon "broad considerations of morality and public well-being" (308 U. S. 338, 340). The Court was of opinion that the use of wire-tapping was "inconsistent with ethical standards and destructive of personal liberty" (*id.*) and that proof obtained by this method was consequently incompetent. The participants to telephonic conversations were deemed to have a right of privacy which public policy re-

quired should remain inviolate against unauthorized intrusions by third persons, whether government agents or others.

No similar policy applies to the present case, since there was here no wire-tapping and no unauthorized invasion of the right of privacy. Each participant to a telephonic communication is at liberty to divulge to anyone he pleases what was said; consequently, the act of disclosure by a participant, in whatever form it may occur, cannot be deemed to be a violation of any right of privacy enjoyed by the other participant. As Judge Clark stated in his dissent, "Reasons of policy justify the making of telephonic communications privileged for the two parties involved; they do not justify making them so privileged to one party as against use by the other" (R. 304). In the present case, for example, Kafton clearly had the right to tell anyone what he had heard respondent say; he clearly had the right to write down the conversation as it occurred and show the written transcription to anyone; and he clearly had the right to connect the actual telephone which he used to a loud speaker and have the conversation heard by others or taken down by a stenographer. There is, we submit, no possible difference, from either an ethical or legal standpoint, between publication of the talk in this manner by the participant himself and publication of it through the playing of a recording made, with the permission of the participant, on an apparatus attached to an extension

phone. Once it is established, as it is here, that disclosure of the substance of the communication is permissible, no moral considerations dictate that the disclosure must be through reliance upon a fallible human memory rather than through reliance upon a mechanical recording.

Certainly the words of Section 605 do not require the conclusion that the recording was a violation of the statute. In the first place, where a communication reaches the person for whom it is intended, it is hard to see how it is "intercepted" when that person directs or permits it to be transcribed. As the court held in *United States* v. *Yee Ping Jong,* 26 F. Supp. 69 (W. D. Pa.), a decision directly contrary to that below, the verb "intercept" means to take or seize before arrival at the destined place; since a recording on an extension phone is made at the destination of the communication and not before it is reached, it can scarcely be deemed an interception within this definition.

Moreover, only such interceptions are forbidden as are not authorized by the "sender." The word "sender" does not literally apply to telephone communications; consequently, its meaning as so applied must depend largely upon the policy sought to be effectuated. Since, as we have shown, there is no policy against the transcription of a telephonic talk with the permission of either participant thereto, the word "sender" as used in Section 605 should, we believe, be interpreted to mean either party to a telephonic communication. So

construed, the recording here involved was plainly beyond the prohibition of the statute.

The contrary decision reached by the court below is sweeping in its implications. As suggested by Judge Clark in his dissent, the rationale of the majority opinion would logically prevent either party to a conversation, without the consent of the other party, from having his secretary listen to a talk on an extension phone and transcribe it (R. 305–306). A decision imposing so far-reaching a restriction with respect to a device in such common and extensive use as the telephone plainly calls, we believe, for review by this Court.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

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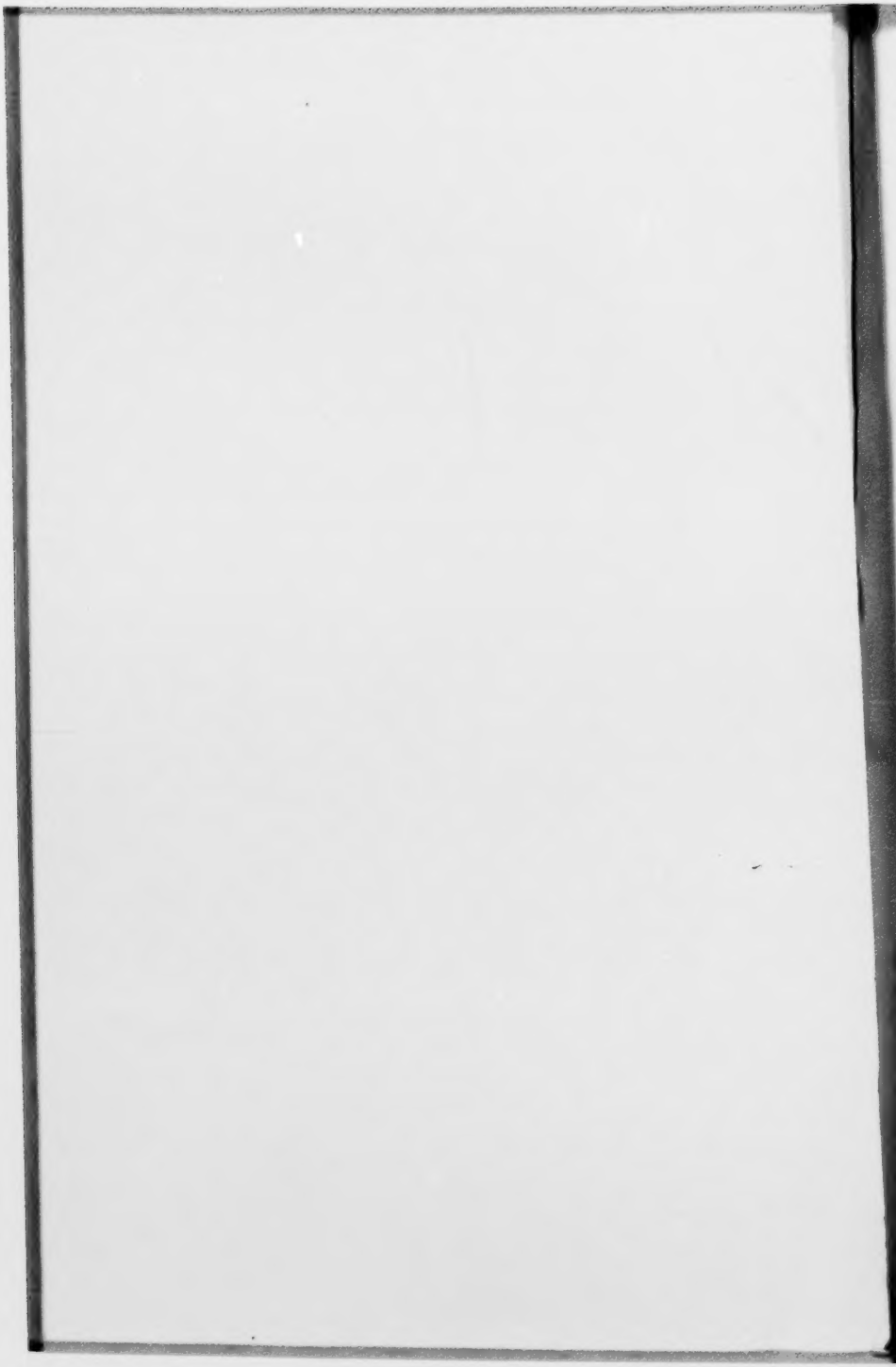

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 295

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE POLAKOFF AND WILLIAM ALBERT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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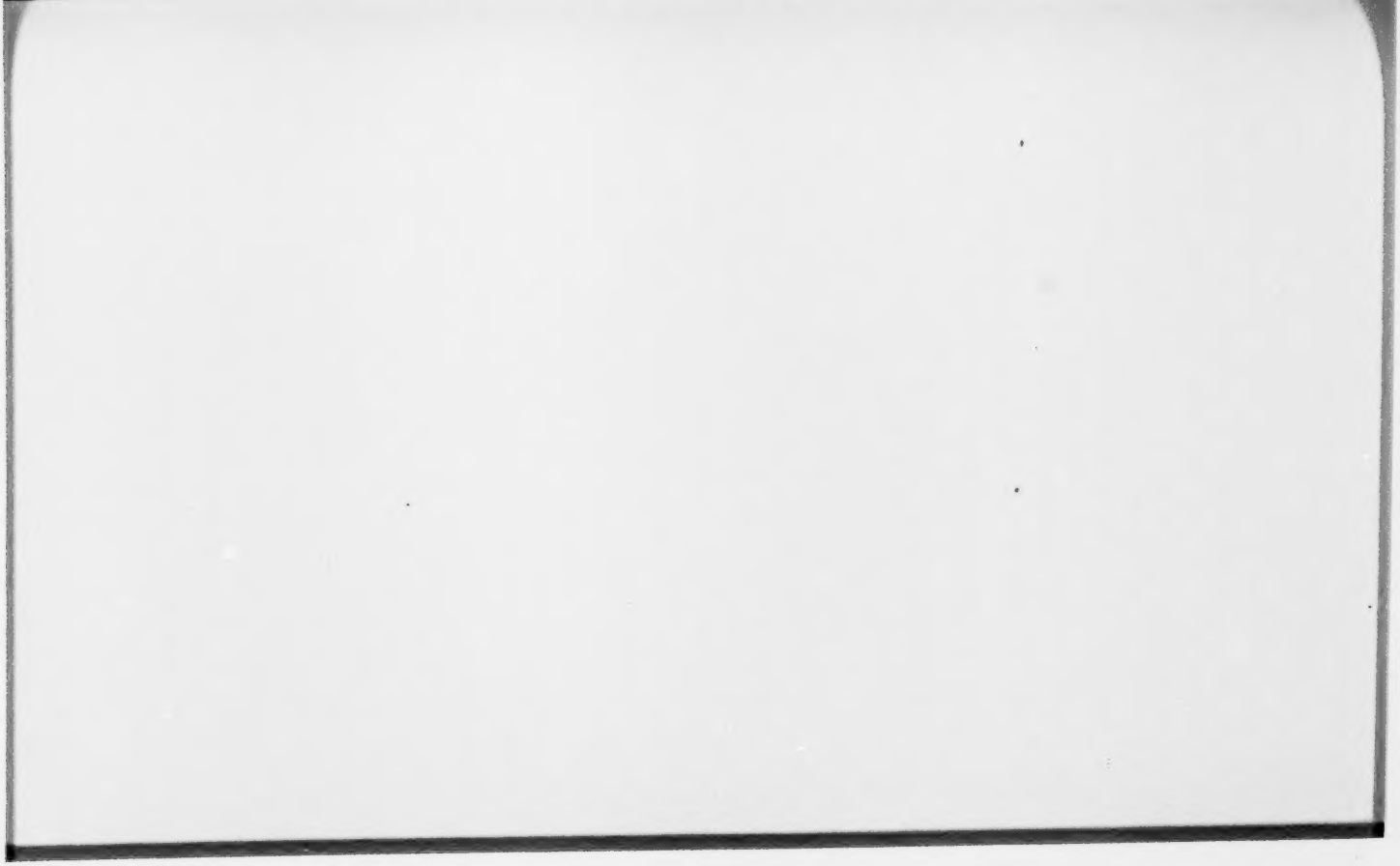

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SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 300-308) is reported in 112 F. (2d) 888.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 26th, 1940 (R. 308). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13th, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7th, 1934.

Question Presented.

Whether, under the circumstances of this case, the interception by Federal agents without the knowledge or consent of the respondents of declarations made by them by telephone to a government witness acting under the direction of the agents would be a violation of Section 605 of the Federal Communications Act.

Statute Involved.

Section 605 of the Federal Communications Act (c. 652, 48 Stat. 1064, 1103, 47 U. S. C., Sec. 605) provides in part as follows:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *."

Statement.

Respondents were indicted for conspiracy under Section 37 of the United States Criminal Code. Upon the first trial which commenced on November 28th, 1939, the jury disagreed. Upon a second trial which commenced on January

3rd, 1940, the respondents were found guilty by the jury (R. 266) and each was sentenced to two years' imprisonment (R. 6-7).

Upon appeal by the respondents to the Circuit Court of Appeals for the Second Circuit, respondents' convictions were reversed. The majority opinion of the court was delivered by Judge Learned Hand (R. 300); a concurring opinion was delivered by Judge A. N. Hand (R. 303); Judge Clark dissented by written opinion (R. 304).

Respondents had never been previously either convicted or arrested for any crime (R. 161).

In general, the indictment charged that the respondents did corruptly represent to one Sidney Kafton, who had been indicted for violation of the Narcotic Laws that they could and would procure in return for a sum of money between $500 and $1000, the imposition of a sentence upon Kafton of not more than one year and one day; that the respondents "did corruptly do certain acts with intent to influence and impede the official acts of officers in and of the United States District Court for the Southern District of New York with respect to criminal cases" pending against Kafton in order that Kafton would receive a sentence of not more than one year and one day (R. 5).

The government's case depended chiefly upon the testimony of one Sidney Kafton, a notorious criminal. While in the United States Navy, he had been court martialed and sentenced to Portsmouth prison for a term of five years for "gambling and against good morals" (R. 38). In 1920 he had pleaded guilty to an attempted holdup of a fur store (R. 35). For this crime he served a sentence of 22 months and 8 days (R. 35). On July 28th, 1939, he was arrested and charged with conspiring to possess, conceal and sell narcotic drugs. An indictment for this crime was filed on August 4th, 1939 (R. 4). Kafton was released on bail in

August, 1939 (R. 21). Upon his release on bail, Kafton went to Putnam County in the State of New York where he pleaded guilty to malicious mischief, arising out of the "rifling" of telephone boxes (R. 22). He received a sentence of 30 days together with a fine of $100 (R. 22). He began serving his sentence for this crime on August 24th, 1939, and was released on September 22nd, 1939 (R. 22).

The history of the accusation in this case against the respondents begins with the return of Kafton to New York City on September 27th, 1939, after he had completed his sentence for malicious mischief in Putnam County (R. 41). He was still under two indictments in the United States District Court for the Southern District of New York for conspiring to sell and for the sale and possession of narcotics (R. 19) and up to that time no disposition had been made of those cases.

Upon return to New York City, Kafton became an informer for the government (R. 41) and worked under the direction of Mr. John E. Tagley, an agent in the Bureau of Narcotics (R. 197). In the early part of his career as an informer, he received expense money from the government (R. 197) and beginning with November 8th, 1939 he began to receive $35 a week from the office of the United States Attorney (R. 45).

Kafton testified that the respondent, Albert, whom he says he met accidently, had proposed to him that if Kafton paid him a fee of $750 he could guarantee him a sentence of not more than one year and a day (R. 24-25). Kafton reported the conversation to the Bureau of Narcotics (R. 25). According to the theory of the government, respondent Polakoff under the alleged conspiracy was to be the person who contacted the Assistant United States Attorney to endeavor to have him recommend upon Kafton's plea of guilty, a sentence of two years (R. 82).

Although Kafton knew that the respondents, Albert and Polakoff were useless to him and that he did not need their help in the slightest degree, Kafton, after pre-arrangement with government officials, persisted in contacting Albert and Polakoff to see what steps they would take to consummate the idle boast made by the respondent Albert. The Assistant United States Attorney who was to be influenced under the alleged conspiracy was fully informed about the alleged scheme by Kafton and the Narcotic agents (R. 82). The whole chain of circumstances developed in the case, was the result of the planned, persistent and concurrent actions by Kafton and officials to entrap the respondents.

Both respondents took the stand in their own behalf and testified to facts which negatived the theory of the government that they intended to corruptly influence the Assistant United States Attorney.

The judgment of conviction of the respondents was reversed on the ground that the recordings of intercepted telephone calls were improperly received in evidence.

Unfortunately, the government's petition does not describe the circumstances surrounding the interception of the telephone calls. The facts in connection with these telephone calls assume some importance. The majority opinion refers to the interception as the "intervention of prosecuting agents bent upon trapping the sender". The majority opinion's characterization of these intercepted messages finds conclusive support in the record from which we shall quote. They were not, as described by the dissenting judge, communications which had reached their intended destination and were recorded at one end of the line by the direction of one of the participants (R. 304).

Kafton testified upon direct examination that he conversed with the respondent Albert over the telephone (R. 27-28). Kafton also testified that on October 24th, 1939 he talked to the respondent Polakoff (R. 30-31).

Upon his direct examination, the witness Kafton testifying for the government did not intimate that he had consented to or had known of the interception of the telephone conversations. As a matter of fact, he testified upon direct examination that he did not know that someone was listening in on the conversation (R. 56). Upon rebuttal for the first time it appeared that the telephone conversations had been intercepted by agents of the Federal Bureau of Investigation by means of a recording device which recorded the telephone conversations on a disc or phonograph record. Upon rebuttal, the government introduced in evidence the records and they were played for the jury (Exhibits 5 and 6; R. 212, 213, 216-218).

In order to supply the "consent of the sender", which the prosecutor believed satisfied the requirements of the statute and made all of the conversations, including respondents' admissions, admissible, Kafton was recalled as a witness of the government (R. 203). The following spectacle was then enacted. Kafton testified that on August 18th, 1939 and again on October 24th, 1939 when he had made the two telephone conversations from the office of the Bureau of Investigation, Mr. Carl A. Herring, an agent "told him" that a recording was to be made and asked him whether he had "any objection" (R. 203-205).

The telephone conversation between Kafton and Polakoff was made by Kafton on October 24th, 1939 (R. 30). At noon, Kafton made arrangements with Mr. Herring, agent for the Federal Bureau of Investigation to make the call to Polakoff from the office of the Federal Bureau of Investigation at 11 o'clock that evening (R. 206). By appointment he met Herring that evening on Centre Street in the City of New York and went with him to the sixth floor of the Federal Building (R. 206).

Although apparently the two had made arrangements to make the call that evening, the following formal conversa-

tion allegedly took place between the agent of the Federal Bureau of Investigation and Kafton, the informer then under indictment acting under directions (R. 202):

"Q. Did you make a phone call? A. Yes.

Q. And did you have a conversation with Herring before, about the phone call? A. Yes, sir.

Q. What was the conversation? A. He told me again there was to be a recording made and did I have any objection.

The Court: What did you say?

The Witness: No.

Mr. Siegel: This is all under objection and exception to this entire line.

The Court: Yes.

Q. Did he tell you a recording was going to be made or did he ask you was it all right to make a recording? A. He asked me, he told me, he asked me if there was any objection to his making a record of the phone call."

From the last question in the portion quoted, it is evident that the prosecutor was not satisfied with the answer of the witness that the agent had "told him" that a recording was to be made. When the prosecutor questioned the witness specifically as to whether the agent "asked him" or "told him" that his recording was to be made, the witness, obviously confused, answered: "He asked me, he told me, he asked me" (R. 204).

It should be noted that this conversation did not take place at the time arrangements were made for the telephone call, but as the witness stated, he could not recall "whether he 'asked me' on the way up or 'told me' on the way up, or just before I made the call" (R. 206).

The same performance between the agent and Kafton had been given on an earlier occasion (R. 203-204).

If the transcript of the conversation between Kafton and the respondent, Polakoff, is read (Ex. 6; R. 216-218), it will

become evident that Kafton's statements to Polakoff were apparently made under the promptings of the Federal agents. Requests and inquiries by Kafton were deliberately interjected by Kafton in these conversations so that any response or even if the respondents remained silent, would be seriously prejudicial to them.

We have, therefore, a deliberate resort to wire tapping, to entrap the respondents criminally.[1]

Reasons for Denying the Petition.

The decision of the Circuit Court of Appeals was plainly compelled by the decisions of this Court in *Nardone* v. *United States*, 302 U. S. 379; *i. d.* 308 U. S. 338, and *Weiss* v. *United States*, 308 U. S. 321.

Judge Augustus N. Hand in his concurring opinion wrote as follows (R. 303-304): "In the face of the foregoing Supreme Court decisions any remedy must rest with the Congress who, in my opinion, can constitutionally permit wire tapping by government authorities with or without such safeguards against abuse as Congress may see fit to impose."[2] After the decision of the Circuit Court of Appeals and as this is written, the House of Representatives has passed and there has been referred to the Senate Committee on Interstate Commerce the bill, H. J. Res. 571, "to authorize

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[1] After the trial of this cause, Kafton pleaded guilty to the indictment against him. Execution of the sentence imposed was suspended and a fine of $1. was ordered remitted.

[2] *e.g.* The amendment to the New York State Constitution passed in 1938 and approved by the vote of the people on November 8th, 1938 provides as follows: "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex-parte orders or warrants shall issue only upon or on affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof". Constitution of the State of New York, Article I, Section 12.

the Federal Bureau of Investigation of the Department of Justice to conduct investigations in the interests of national defense, and for that purpose to permit wire tapping in certain cases." Such investigations would be subject to the direction of the Attorney General and would be to ascertain the facts, to prevent and frustrate interference with national defense by means of sabotage, treason, seditious conspiracy, espionage, and so forth. It is provided that Section 605 of the Communications Act of 1934 would not apply to investigations authorized under this bill. This provision could be used, however, only in cases where the Attorney General finds probable cause to believe that any of the above offenses have been or are about to be committed, and then only with certain limitations.

Apparently, there has been no demand for the removal of any of the restrictions on wire tapping as applied to any other situation. On the other hand, the proposed law recognizes the policy of Congress never to permit wire tapping in any situation without definite safeguards and limitations.

Any different interpretation of Section 605 of the Federal Communications Act would impute to it "a self-defeating, if not disingenuous purpose". If wire tapping is a "dirty business" as Justice Holmes characterized it in dissenting in *Olmstead* v. *United States,* 277 U. S. 438, then, we can hardly conceive of any "dirtier business" than the use made of wire tapping in this case and the manner in which it was introduced in the record of the court. The majority opinion of the Circuit Court of Appeals is sound, well reasoned and metes substantial justice. There is no need, we believe, of any further interpretation by this Court of Section 605 of the Federal Communications Act.

Moreover, it is also submitted this case is not a proper one for review. On the entire record and in the interest of substantial justice, these respondents are entitled to a new trial.

Argument.

I.

The Circuit Court of Appeals was correct in holding that the admission in evidence of the reproductions of the intercepted telephone conversations upon rebuttal was prejudicial error.

Nardone v. *United States*, 302 U. S. 379;
Nardone v. *United States*, 308 U. S. 338;
Weiss v. *United States*, 308 U. S. 321.

This Court described its own decision in the first *Nardone* case, 302 U. S. 379, as "not the product of a merely meticulous reading of technical language" but "the translation into practicality of broad considerations of morality and public well-being". (308 U. S. 338, 340.)

Further describing its findings, this Court stated: "This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty', 302 U. S. 379, 384. To forbid the direct use of methods this characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'" (308 U. S. 338, 340).

If the Circuit Court of Appeals had given its approval to the legal gymnastics indulged in by the prosecutor to inject into the record of this cause this pernicious wire tapping testimony, then certainly it would invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty".[3]

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[3] The wire tapping testimony was not offered in the first trial. It was introduced upon rebuttal upon the second trial. The second *Nardone* case and the *Weiss* case were decided by this Court on December 11, 1939. The second trial of the respondents was commenced on January 3rd, 1940.

Petitioner admits that by this Court's decisions, participants to telephonic conversations were deemed to have a right of privacy which public policy required should remain inviolate against unauthorized intrusions by third persons, whether government agents or others (Petition, pp. 7-8). Petitioner contends, however, that there was no interception and no unauthorized invasion of the right of privacy (Petition, pp. 8-10). In this respect the petition reveals a glaring inconsistency. If there was no interception as contended by the petitioner, it is difficult to understand why the prosecutor persisted in attempting to establish that Kafton consented to the interception (R. 203; 204-205). It is argued that there is no interception of a communication which has reached its intended destination. The majority opinion of the Circuit Court of Appeals disposes of this metaphysical distinction without much difficulty (R. 300). Judge Learned Hand wrote:

> "Moreover, the recording was an 'interception'. It is true that in the three decisions in which the Supreme Court has interpreted § 605, Title 47 U. S. Code, the prosecuting agents had physically interposed some mechanism in the circuit as it had been constructed for normal use; at least this is what we understand by a 'tap'. That was not the case here; the recording machine was merely fixed to an existing 'extension' of the familiar kind in an adjoining room. We assume that the situation would have been no different, had the agent merely listened at the extension, and taken down what he heard by shorthand. The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts" (R. 301).

Certainly the place where the interception occurred or by what method should not be the determining factor. Sec-

tion 605 of the Federal Communications Act does not contemplate the use of a ruler or any other measuring device. Under the Government's theory there could never be an interception of a telephonic communication as long as the communication has reached its intended destination. Such a theory completely destroys the purpose of Section 605 of the Federal Communications Act and would stultify the policy which compelled this Court's decisions. The Government's theory would reward ingenuity in circumventing the statute. Furthermore, under the theory of the Government, the result would be no different if the extension were located either in the cellar of the building of the Federal Bureau of Investigation or in the cellar of the home of one of the respondents. It is impossible to reconcile the Government's argument with the underlying purpose of Section 605 of the Federal Communications Act.

The petitioner further contends that the consent of Kafton furnished the necessary "consent of the sender" as required by the Statute. As to this, Judge Learned Hand in the majority opinion, wrote as follows (R. 301):

> "So far there can be no reasonable dispute. Every telephone talk, like any other talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by § 605 to hold that because one party originated the call he had power to surrender the other's privilege."

It is common knowledge that every telephone instrument at both ends of the lines has both a sending and a receiving apparatus. Each participant to a telephonic conversation is alternately a receiver and a sender. Kafton could not consent for either the respondent Albert or the respondent Polakoff to the interception or divulgence of the messages sent by them to Kafton. Kafton was not their agent and no exchange of formalities between Kafton and the Federal agents can have the effect of authorizing or justi-

fying an invasion of their right of privacy which has been given the respondents by the statute and under the Fourth and Fifth Amendments to the Constitution of the United States. The courts will not interpret an act of Congress so as to impute to it a "self-defeating if not disingenuous purpose" (308 U. S. 338, 341).

It will serve no useful purpose to speculate as to possible situations which Section 605 might embrace from a private standpoint as set forth in the dissenting opinion. cf. *Berdau* v. *McDowell*, 256 U. S. 465.

Nor does it matter that Kafton could tell anyone what he had heard respondent say over the telephone. The statute does not purport to deal with Kafton's activities. Such statements by Kafton to third persons would be self-serving declarations; furthermore, the testimony of third persons concerning what Kafton had told them would come within the condemnation of the rule against hearsay testimony. Nor do we need to speculate about the consequences attendant upon the attachment of a loud speaker to the telephone. The majority opinion clearly answers these arguments and defines the scope of Section 605 of the Federal Communications Act. Judge Learned Hand said:

> "We need not say that a man may never make a record of what he hears on the telephone by having someone else listen at an extension, or, as in the case at bar, even by allowing him to interpose a recording machine. The receiver may certainly himself broadcast the message as he pleases, and the sender will often give consent, express or implied, to the interposition of a listener. Party lines are a good illustration; and it would be unwise to try in advance to mark the borders of such implications. Here, however, we need not be troubled by niceties, because, no matter what the scope of any such implied consent, it cannot extend to the intervention of prosecuting agents bent upon trapping the 'sender' criminally" (R. 301-302).

Judge Clark in his dissenting opinion becomes alarmed about the partial privilege that may be obtained by criminals if they take the precaution of communicating with each other by wire or radio (R. 306); there is also a concern in the dissenting opinion over the rejection by the statute of the best evidence (R. 305).

The detection of crime must operate within certain limits. The Fourth and Fifth Amendments to the Constitution of the United States have been barriers, we suppose, to crime detection for many years. Yet no person interested in the protection of the liberty of the individual would seriously support the repeal of these Amendments. Time and again this court, in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it.

In *United States* v. *Lefkowitz,* 285 U. S. 452, this Court condemned as unreasonable, a general exploratory search of premises solely for the purpose of obtaining evidence, although the search was made with a warrant or accompanied an arrest.

In *Gouled* v. *United States,* 255 U. S. 298, this Court held that testimony obtained by Federal agents from defendants by stealth and deceit would be a violation of the Fourth and Fifth Amendments to the Constitution of the United States.

In *Ex Parte Jackson,* 96 U. S. 727, it was held that a sealed letter entrusted to the mail is protected by the Amendments.[4]

In the first *Nardone* case, *supra,* this Court wrote that "the same considerations may well have moved the Con-

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[4] The following is the comment of Mr. Justice Brandeis upon this case in his dissenting opinion in *Olmstead* v. *United States,* 277 U. S. 438, 475:

"The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard."

gress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy embodied in the Fourth and Fifth Amendments to the Constitution'' 302 U. S. 379, 383. There is therefore ample authority to support the rejection by the Circuit Court of Appeals of wire tapping deliberately used to entrap the respondents criminally.

This Court has put an end to ''wire tapping'' testimony, whether communications that were intercepted were interstate or intrastate. The door should remain closed. Moreover in this particular case the deliberate use of wire tapping testimony upon rebuttal [5] and the tricky circumstances under which it was obtained is shocking to the common man's sense of decency and fair play. If the right of privacy is to prove a valuable social asset, it will be because qualifications and exceptions are not engrafted upon a statute protecting it.

Conclusion.

Petitioner's contentions were carefully reviewed and clearly decided by the court below. The issue was fully explored and the opinion of the majority of the court is sound and well reasoned. The decision of the Circuit Court of Appeals was plainly compelled by the very recent decisions of this Court and it is not in conflict with any other decision by any other Circuit Court of Appeals.

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[5] There is ample authority to sustain the proposition that the admission of this testimony whether competent or incompetent, upon rebuttal, was highly improper. It is not the proper function of rebuttal testimony to confirm and repeat statements and claims which were made part of the prosecution's direct case and were subsequently denied by the defense. 4 *Wigmore on Evidence* (2d Ed.) Section 1873; 64 *Corpus Juris*, Section 177, page 155; *Light* v. *Toledo, St. L. & W. R. Co.*, 208 Fed. 158 (D. C. Ohio, 1913); *Stone* v. *Chicago, M. St. P. & P. R. Co.*, 53 F. (2d) 813 (C. C. A. 8th, 1931).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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(9619)

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248027—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. FALLON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on June 26, 1940, reversing the conviction of the respondent in the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the court below (R. 280–281) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals, reversing the conviction of the respondent, was entered June 26, 1940 (R. 281). The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the recording of a telephone conversation, with the authorization of one party thereto, on a recording apparatus attached to an extension line, constitutes a violation of Section 605 of the Federal Communications Act.

STATUTE INVOLVED

Section 605 of the Federal Communications Act (c. 652, 48 Stat. 1064, 1103, 47 U.S.C., Sec. 605) provides in part as follows:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *

STATEMENT

Respondent was indicted for committing perjury in his testimony before a grand jury investigating the activities of former Circuit Judge Martin T. Manton. The first count of the indictment charged that respondent testified falsely before the grand jury on March 13, 1939, when he denied that he had discussed the investigation with one Alfred Reilly, and when he denied that he had

advised Reilly to destroy records pertaining to the investigation. The second count of the indictment charged that on March 30, 1939, respondent again testified falsely before the grand jury. Six assignments of perjury are set forth in this count; basic to all is respondent's denial in his testimony before the grand jury of having talked over various aspects of the investigation with Reilly. (R. 3–6.)

At the trial, Reilly testified to having had several telephone conversations with respondent concerning the investigation, during the course of which respondent had advised him to destroy various records pertaining to the investigation (R. 40). Typewritten transcripts of two of the telephone conversations were admitted in evidence and read to the jury (R. 126–127). Both tended to contradict the testimony given by respondent before the grand jury (R. 243–255). When respondent testified in his own behalf at the trial, he admitted that the transcripts correctly set forth his conversations with Reilly (R. 156–157).

The transcripts were made under the following circumstances: Reilly, who was involved in one of the cases before Judge Manton which was being investigated by the grand jury, had decided to cooperate with the Government (R. 33–34). Because Reilly was nervous, the United States Attorney asked him if he would like to have a Federal Bureau of Investigation agent stay with him for a couple of weeks (R. 34). Reilly said that he would ap-

preciate this, and an agent was assigned to remain with him at his home (R. 34).

Thereafter Reilly agreed with the F. B. I. agent that a recording apparatus should be installed in his home so that records of telephone conversations could be made (R. 35, 102). Reilly felt that he would rather have the truth of whatever he said recorded than leaving it a matter for conjecture (R. 35). Accordingly, a recording device was installed, with the consent of Reilly, in the basement of his house (R. 36, 121). Pursuant to a previous agreement with respondent (R. 36, 69), Reilly then telephoned him and the conversation was recorded by an F. B. I. agent with the knowledge and consent of Reilly (R. 36). On the following day, again pursuant to agreement with respondent (R. 36, 39), Reilly again telephoned him and this conversation, too, was recorded by the F. B. I. agent with Reilly's knowledge and consent (R. 39). Typewritten transcripts of the records of both conversations were subsequently made (R. 123, 243–255). These were the transcripts which were introduced in evidence and read to the jury (R. 126–127). The recordings were also introduced in evidence (R. 126), but they were not played to the jury.

The jury found the respondent guilty (R. 220) and he was sentenced to imprisonment for nine months (R. 2). On appeal to the court below, the judgment of conviction was reversed, Judge Clark dissenting, on the sole ground that the transcripts

of the telephonic communications were improperly received in evidence (R. 280–281).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the recording of a telephone conversation with the authorization of one party thereto, on a recording apparatus attached to an extension line, is an "interception" within the meaning of Section 605 of the Federal Communications Act.

2. In holding that under Section 605 of the Federal Communications Act one party to a telephone conversation, without the consent of the other, cannot validly authorize a Government agent to overhear, record, and divulge such conversation.

3. In holding as a matter of law that a person who, with the consent of one party to a telephone conversation, listens to such conversation, cannot testify to the substance of the conversation over the objection of the other party to the conversation.

4. In reversing the judgment of conviction.

REASONS FOR GRANTING THE WRIT

This case was decided by the court below on the authority of *United States* v. *Polakoff*, in which a petition for certiorari is being filed herewith, No. —, present Term. Since the issue in this case is precisely the same as that in the *Polakoff* case, we

respectfully refer the Court to our petition in the *Polakoff* case for a statement of the reasons for granting the writ here.

CONCLUSION

We respectfully submit that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

No. 296

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, *Petitioner,*

against

THOMAS J. FALLON, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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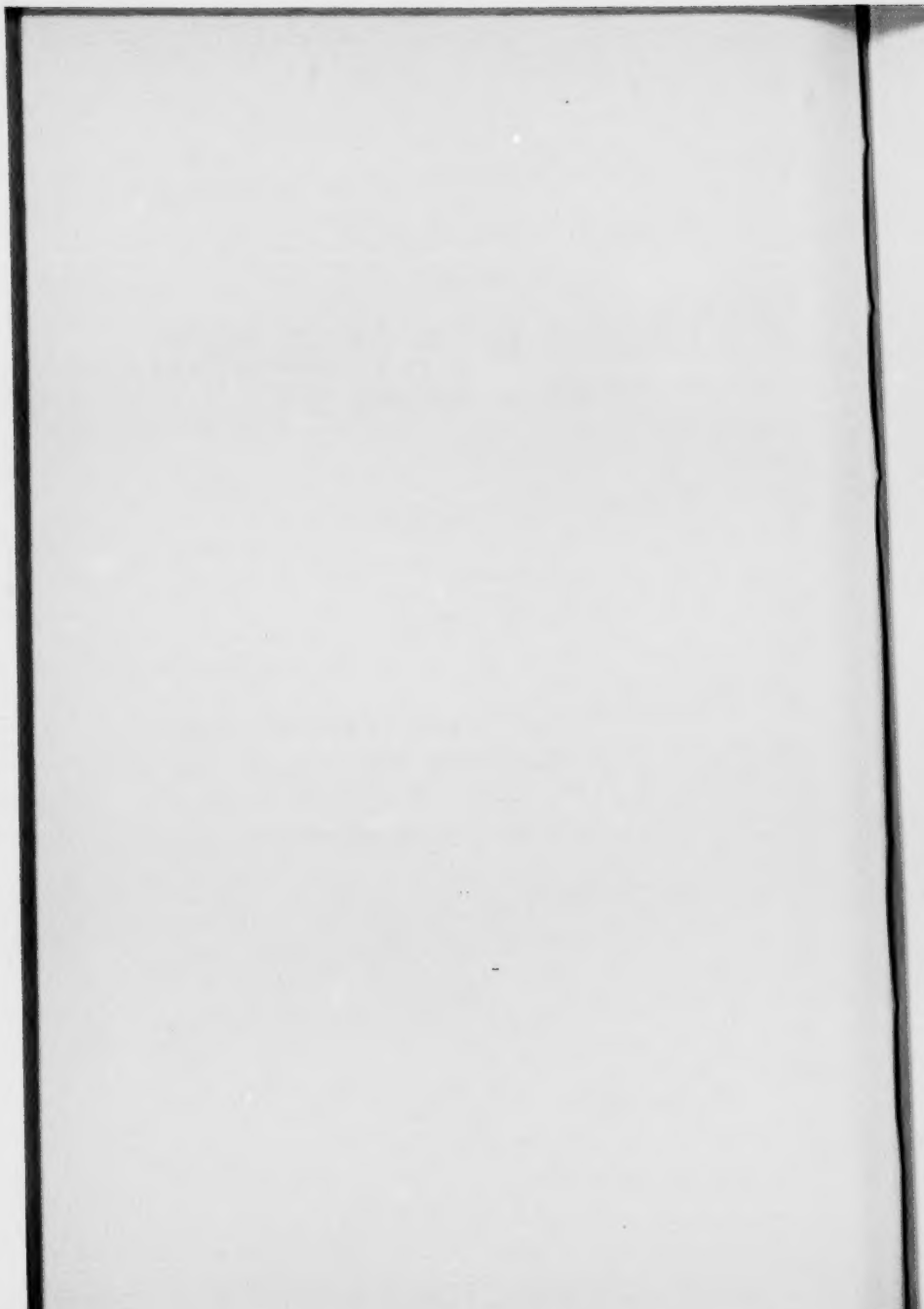

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No. 296

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

UNITED STATES OF AMERICA,
Petitioner,

against

THOMAS J. FALLON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas J. Fallon, the respondent above named, was convicted of the crime of Perjury (Section 231, Title 18, U. S. Code) after a trial before a District Judge and jury in the United States District Court for the Southern District of New York. Thereafter, the Circuit Court of Appeals for the Second Circuit reversed the conviction and ordered a new trial, upon the ground that the trial court had improperly admitted in evidence phonographic recordings and typewritten transcripts of certain telephone communications transmitted by respondent and intercepted by agents of the Federal Bureau of Investigation, in violation of Section 605 of the Federal Com-

munications Act. (*United States* v. *Fallon,* 112 Fed. 2nd 894.) Simultaneously with the reversal of respondent's conviction, the Circuit Court reversed another conviction upon similar grounds. (*United States* v. *Polakoff,* 112 Fed. 2nd 888.)

Statement of Facts

On or about February 7th, 1939, a Grand Jury was impanelled in the United States District Court for the Southern District of New York, to investigate charges of alleged misconduct on the part of Martin T. Manton, former Chief Judge of the Circuit Court of Appeals for the Second Circuit. Among the matters being investigated was a charge that one Alfred F. Reilly had paid certain moneys to Judge Manton for the purpose of influencing his judicial action in a matter pending before him, in which matter Reilly was financially interested. The moneys were allegedly collected for Judge Manton by William J. Fallon, a brother of the respondent (R. 14).

Shortly after the Grand Jury commenced its investigation, Reilly confessed his improper dealings with Judge Manton to the prosecuting authorities. Thereupon, one Darold B. Hickman, a special agent of the Federal Bureau of Investigation, was detailed to accompany Reilly to his home in North Attleboro, Massachusetts (R. 34). While Reilly was absent from his home, respondent telephoned from New York and left a message for Reilly to call him back. Accordingly, upon Reilly's arrival home with Hickman, on March 6th, 1939, Reilly telephoned respondent in New York and Hickman "listened in" to the conversation upon an extension telephone. During the conversation Reilly informed respondent that he would telephone him again the following day (R. 36).

On the next day, March 7th, 1939, a mechanical wire-tapping device known as a "Presto Recording Unit" was "tapped in" to the telephone wires in the basement of Reilly's home, for the purpose of intercepting and recording the conversation which was to take place between Reilly and the respondent. The machine was installed with Reilly's knowledge, by James W. Ransom, another agent of the Federal Bureau of Investigation (R. 36). After the machine had been installed, Reilly telephoned respondent, and the conversation between them was intercepted and recorded (R. 36). On the following day, March 8th, 1939, Reilly again telephoned respondent from a summer camp at Taunton, Massachusetts, to which the wire-tapping apparatus had been moved in the meantime. This conversation, also, was intercepted and recorded by federal agents Hickman and Ransom (R. 39).

About one week later—on March 14th, 1939—respondent was called before the so-called Manton Grand Jury. He appeared again before the same Grand Jury on March 30th, 1939. On both occasions, in response to questions propounded by the District Attorney, respondent denied having previously discussed the pending investigation with Reilly. He also denied having advised Reilly to destroy certain records pertaining to the investigation (see Grand Jury testimony, Government's Exhibits 6 and 7). On the basis of these denials respondent was subsequently indicted for perjury (see Indictment, R. 3).

Upon the trial of the indictment, the Government sought to establish the falsity of respondent's Grand Jury testimony by introducing in evidence phonographic records and typewritten transcripts of the statements made by him during his telephone conversations with Reilly on March 7th and March 8th, 1939. Respondent objected to

the introduction of these records upon the ground that they had been obtained by intercepting his communications without his consent, in violation of Section 605 of the Federal Communications Act. The records were, nevertheless, admitted in evidence upon the theory that Reilly's consent to the installation of the wire-tapping machine rendered the records admissible in evidence against the respondent (R. 97).

POINT I

The decision sought to be reviewed herein is in conformity with principles of law established by this Court.

The recent decisions of this Court in the *Nardone* and *Weiss* cases* have dispelled all doubt upon the question of the admissibility of evidence obtained by wire-tapping. It is now firmly established that Section 605 of the Federal Communications Act prohibits the unauthorized interception of telephone communications by federal officers engaged in the investigation and prosecution of crime, and that evidence directly or indirectly obtained by such means may not be admitted against a defendant in a federal prosecution.

In the case at bar, it is not claimed that respondent authorized the interception or divulgence of the messages transmitted by him to Reilly. It is contended, however, that he lost his privilege against interception and divulgence by virtue of the fact that Reilly, who initiated the calls in question, consented to the installation of the wire-

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* *Nardone* v. *U. S.*, 302 U. S. 379.
Weiss v. *U. S.*, 308 U. S. 321.
Nardone v. *U. S.*, 308 U. S. 338.

tapping machine by means of which the communications were intercepted and recorded. The fallacy of that contention is aptly demonstrated by Judge Learned Hand in the prevailing Opinion in the *Polakoff* case (112 Fed. 2nd 888, 889), as follows:

> "Every telephone talk, like any other talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by Section 605 to hold that because one party initiated the call he had power to surrender the other's privilege."

The soundness of this ruling cannot be successfully challenged. To hold that one party to a telephone call—regardless of whether he initiates or receives it—has power to authorize interception against the other party, would not only destroy the privilege created by the statute, but would afford investigating officers a means of circumventing the rule established by this Court and provide them with a method of continuing the very practice which it condemned.

On the first appeal in the *Nardone* case (302 U. S. 379) Mr. Justice Roberts pointed out that the practice of intercepting telephone communications is "inconsistent with ethical standards and destructive of personal liberty". Obviously, as to the person against whom it is directed, the interception is equally unethical and destructive of personal liberty, whether effected with or without the consent of the other participant in the conversation. True, under the statute, either party may waive his privilege against interception and divulgence. But nothing short of an express waiver by the "sender" himself can authorize interception or divulgence of his communication, or justify its admission in evidence against him in a criminal proceeding.

It is not necessary to comment upon the suggestion that the effect of the ruling in this case will be to afford those engaged in criminal activities immunity from prosecution. Similar arguments were advanced in the *Nardone* and *Weiss* cases, and each successive attempt to legalize wire-tapping upon that basis has been properly rejected. It is to be hoped that this Court will not recede from its courageous attitude and that it will likewise reject the present attempt.

POINT II

Respondent's telephone communications to Reilly were "intercepted", within the meaning of Section 605 of the Federal Communications Act.

Upon this application, the Government adopts a wholly inconsistent position. It contends first, that the records introduced in evidence were admissible upon the theory that the interception was "authorized by the sender", within the meaning of the statute. It then contends that no "interception" whatsoever took place, by virtue of the fact that the messages were not deflected from their course and ultimately reached their intended destination. That theory is fallacious to the point of absurdity.

As pointed out by Judge Learned Hand in the *Polakoff* case, "Anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts."

The proof is uncontradicted that Hickman and Ransom, the Government agents, tapped into the telephone wires by means of a mechanical device, and recorded respond-

ent's messages as they were transmitted through the machine. True, the messages reached their intended destination. But they were intercepted and recorded in the course of transmission, between the point of origin and the point of destination. To hold that this did not constitute an "interception", within the meaning of the statute, would render the statute meaningless and wholly ineffectual to accomplish the purpose for which it was enacted.

To demonstrate the unsoundness of the Government's theory, it is sufficient to point out that in the *Nardone* and *Weiss* cases, as in the case at bar, the messages were not deflected from their course and ultimately reached their intended destination, albeit none of the participants in the conversations knew that their messages were being intercepted and recorded. Obviously, the fact that one of the participants has knowledge of the interception does not alter the character of the "interception".

Moreover, the question involved in this case is not whether evidence obtained by attaching a recording apparatus to an "*extension line*" is admissible, as asserted on page 2 of the Petition herein. Respondent does not concede that it makes any difference where the recording apparatus is attached—whether to an extension line or to the main wire. The fact remains, however, that in the case at bar, as distinguished from the *Polakoff* case, the apparatus was attached to the telephone wires in the main circuit and not to any "*extension line*". The proof shows that during the first conversation between respondent and Reilly the apparatus was attached to the wires in the basement of Reilly's home (R. 36). During the second conversation it was attached to the wires in the kitchen of his summer camp (R. 39). In both instances the wire

tapping was accomplished in the usual manner and the voices were recorded *before* they reached their intended destination.

It is absurd to argue that the ruling in this case would prevent an employer from having his employee listen in to his conversation on an extension telephone. That question is not even involved in this case and the only question presented for determination is whether investigating or prosecuting officers may intercept telephone communications for the purpose of obtaining incriminating evidence. That question was fully answered by this Court in the *Nardone* and *Weiss* cases, and is no longer open to controversy.

POINT III

The petition for a writ of certiorari herein should be denied.

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